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Supreme Court of the United States

OCTOBER TERM, 1963

No. 56

HONORABLE FRANCIS L. VAN DUSEN, JUDGE, ETC., ET AL., PETITIONERS,

vs.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

No. 80

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS,

vs.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 56—PETITION FOR CERTIORARI FILED JANUARY 11, 1963
NO. 80—PETITION FOR CERTIORARI FILED FEBRUARY 21, 1963
CERTIORARI GRANTED APRIL 15, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30257, 30258, 30259, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346 and Nos. 321, 323, 325, 327, 329, 335 and 375 of 1961 in Admiralty

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SIDNEY W. POPKIN,

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP., and GENERAL MOTORS CORPORATION

and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C.A, 29724), except Civil Actions Nos. 30390 and 30391

[fol. 2]

OPINION SUR MOTIONS TO TRANSFER

VAN DUSEN, J. April 6, 1962

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane

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[1] There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiffs" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C. A. 30307).

manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U.S.C.A. §1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C.A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other planes using the Logan International Airport, Boston, at about the time of the accident.

In *Jurgelis* v. *Southern Motors Express*, 169 F. Supp. 345 (E.D. Pa. 1959), this court said:

> "In Norwood v. Kirkpatrick, 1955, 349 U.S. 29, . . . the Supreme Court, in discussing the relation of 28 U.S.C.A. §1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in Gulf Oil Corp. v. Gilbert, 1946, 330 U.S. 501, . . . said at page 32 . . . :
>
> "' . . . we believe that Congress, by the term "for the convenience of parties and witnesses, in [fol. 3] the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.'
>
> "It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under §1404(a) are established by the Gulf Oil Corp. case,[2]

[2] In the *Gulf Oil Corp.* v. *Gilbert case*, supra, the court said at pp. 508-9:

"... An interest to be considered, and the only likely to be most pressed, is the private interest of the litigant. Important consid-

and the degree of discretion to be exercised by the court is established by the Norwood case."

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in *Medich* v. *American Oil Company*, 177 F. Supp. 682, 683 (E.D. Pa. 1959). See, also, *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (3rd Cir. 1952), where the court said at page 1011:

"The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if [fol. 4] he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt."

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erations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U.S.C.A. §1404(a), as follows:

I. Convenience of the Parties

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to have these cases tried in the District of Massachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U.S.C.A. §1404(a). None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. Convenience of Witnesses

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpa- [fol. 5] bility of the defendants.[4] The Collins Affidavit

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[3] There is nothing in 28 U.S.C.A. §1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, *Norwood* v. *Atlantic Coast Line RR. Co.*, C.A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub. nom. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955); *Harry Winston, Inc.* v. *Zale Jewelry Company*, 191 F. Supp. 686 (S.D. N.Y. 1961); *Huff* v. *Nashville, Chattanooga & St. Louis Ry.*, 88 F. Supp. 735 (S.D.N.Y. 1949). As stated in *Brown* v. *Woodring*, 174 F. Supp. 640, 645 (M.D. Pa. 1959):

> "'Defendant's mandatory margin for victory . . . need not be an overwhelming one.' A court should not hesitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

[4] The Massachusetts Death Act, in relevant part, provides:

> "A person who (1) by his negligence causes the death of a person . . ., or (2) by wilful, wanton or reckless act causes

(Document No. 31 in C.A. 28664) allege that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C.A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve

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death of a person . . ., or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger . . ., shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability. . . . A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages are to be assessed with reference to the degree of culpability of his agents or servants."

Mass. Ann. Laws, c. 229, §2 (Suppl. 1961).

[5] The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

[6] In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions to Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S. C. (Document No. 35 in C.A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

miles of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C.A. 28664); and (f) five other potential witnesses having knowledge of the [fol. 6] presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C.A. 28664).[7] Also, it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. *MacAlister* v. *Guterma*, 263 F. 2d 65, 68-70 (2nd Cir. 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional, specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C.A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C.A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the

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[7] The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to Document No. 30 in C.A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

[8] Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U.S.C.A. §1402(b), providing that the United States may only be sued "where the plaintiff resides, or wherein the act or omission complained of occurred."

[9] For example, the McConnell Affidavit (Document No. 29 in C.A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C.A. 28664 and Documents Nos. 34 and 35 in C.A. 28741.

damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of [fol. 7] negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C.A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C.A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Massachusetts in any event

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[10] If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

[11] A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

III. The Interest of Justice

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:

[fol. 8]

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial.

See *MacAlister* v. *Guterma*, supra, at 68-70; *O'Donnell* v. *Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in *Kelly* v. *Greer*, 295 F. 2d 18, 21 (3rd Cir. 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

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[12] Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C.A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

(2) The conduct of as few trials as feasible on the issues of liability and culpability.

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F. 2d 839, 851 (1st Cir. 1947); *United States* v. *Knauer*, 149 F. 2d 519 (7th Cir. 1945), aff'd. 328 U.S. 654 (1946); cf. *Walker* v. *Loop Fish & Oyster Co.*, 211 F. 2d 777, [fol. 9] 780-1 (5th Cir. 1954); *Howey* v. *Yellow Cab Co.*, 181 F. 2d 967, 973 (3rd Cir. 1950), aff'd. sub. nom. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). In the *Howey case*, supra, the court said at page 973:

> "Surely the stricture of the Sherwood case . . ., would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge."

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See *Weitort* v. *A. H. Bull & Company*, 192 F. Supp. 165 (E.D. Pa. 1961); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Polak* v. *Koninklijke Luchtvaart Maatschappij, etc.*, 19 F.R.D. 87 (S.D.N.Y. 1956); and cases cited in those cases. In the *Polak case*, supra, the court said at page 88:

> "The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. . . . (Citing case.) Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judicial business, impel consolidation under such circumstances."

In the *Hassett case*, supra, involving five actions arising out of one accident, the court said at page 664:

> "... it will save time for parties, witnesses, counsel and courts; to have the entire matter disposed of at one trial. ...
>
> [fol. 10] "The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all the cases."

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U.S.C.A. 1404(a) have resulted from the desirability of consolidating the transferred cases for trial with other similar cases pending in the transferee District. See *A/S Dampskibsselskabet Svendbord* v. *United States*, 116 F. Supp. 603 (E.D. Tex. 1953), where the court said at page 606:

> "However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict."

See, also, *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 21 (1960); *Cressman* v. *United Air Lines*, 158 F. Supp. 404 (S.D.N.Y. 1958); *Winsor* v. *United Air Lines*, 153 F. Supp. 244 (E.D.N.Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See *MacAlister* v. *Guterma*, supra. In *Crosley* v. *Hazeltine Corporation*, 122 F. 2d 925 (3rd Cir. 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than [fol. 11] several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served.

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston Airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C.A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See *Allied Petro Products Incorporated, etc.* v. *Maryland Casualty Company*, C.A. No. 30180, and cases cited at pages 3-4 of Opinion of 12/22/61 (Document No. 7). The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as *Curtis* v. *A. Garcia Y. Cia*, 272 F. 2d 235 (3rd Cir. 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite pos-

[fol. 12] sible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the cases in the interest of justice.

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in *Gulf Oil Corp.* v. *Gilbert* (see second paragraph quoted in footnote 2, supra) favor trial in the transferee District:

(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).

(b) The trial of the issues of liability and culpability will be held "in a forum that is at home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21) if these cases are transferred. Cf. §612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be.

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of [fol. 13] injury to the substantive rights of the parties."

Richards v. *United States*, 369 U.S. (1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U.S.C.A. §1404(a), does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See *Headrick* v. *Atchison, T.&S.F. Ry. Co.*, 182 F. 2d 305, 309-310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F. Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F. Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibralter Enterprises*, 85 F. Supp. 410, 414 (D. New Mex. 1949);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time.

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals in *Kilberg* v.

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[13] It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page of 369 U.S.).

[14] In this case, the court used this language at page 414:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

Northeast Air Lines, Inc., 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, [fol. 14] 172 N.E. 2d 526 (1961), to support the application of Article 3, §21, of the Pennsylvania Constitution,[15] (2) an older Pennsylvania Supreme Court case [*Passenger Railway Co.* v. *Boudreau*, 92 Pa. 475, 481-2 (1880)] to support the application of Article 1, §11, of the Pennsylvania Constitution[16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal representative plaintiffs con-

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[15] Article 3, §21, provides:

"... in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, §18, of the New York Constitution, relied on in the *Kilberg case*, supra, provides: "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the *Kilberg case*, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

[16] Article 1, §11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[17] *Nesbitt* v. *Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank* v. *Kirk*, 222 Pa. 567 (1909). Although language in *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 132 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See *Commonwealth* v. *Musser Forests, Inc.*, 394 Pa. 205, 146 A. 2d 714 (1958); *Laughlin et al.* v. *Baltalden, Inc.*, 191 Pa. Super. 611, 617-8 (1960); cf. *Ward* v. *Rice*, 29 F. Supp. 714 (E.D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See *Personal Fin. Co.* v. *Gen. Fin. Co.*, 133 Pa. Super. 582, 585-6 (1938).

tend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000. limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, *Slater* v. *Mexican National R.R. Co.*, 194 U.S. 120 (1904); *Kvecht* v. *United States*, 242 F. 2d 929 [fol. 15] (3rd Cir. 1957); *Rennekamp* v. *Blair*, 375 Pa. 620 (1954); cf: *Hughes* v. *Railroad Co.*, 202 Pa. 222, 228-9 (1902); and *Quaker Mills Corp.* v. *Howard Corp.*, 131 Pa. Super. 1, 8-9 (1938).[18] Also, defendants contend that the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 400-401 (1952); *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947); *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 160 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

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[18] In the *Hughes case*, the court used this language at pp. 228-9:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance, by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach, causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in Forepaugh v. R.R. Co., and in Fairchild v. R.R. Co. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett v. R.R. Co. In the Fairchild case, as the injury occurred in Maryland, this court enforced the law of that state; if the injury to the horse had been delayed until in the course of the journey, it had reached Pennsylvania, our own law of public policy would have controlled."

This approach seems different than the New York law, as exemplified in the *Conklin case*, relied on in the majority opinion in *Kilberg* at page 528 of 172 N.E. 2d.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[19] [fol. 16] the determination of the law governing the measure of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

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[19] See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-8 (1959); *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25 (1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the *Thibodaux case*, the court said at page 27: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the *Harrison case*, the court said at page 176:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U.S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . . .'"

[20] It is noted that two actions previously pending in this court (C.A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

[21] Also, it is noted that the application of the Full Faith & Credit Clause to the dictum of the majority in the *Kilberg case*

Finally, it should be noted that the considerations stated in 28 U.S.C.A. §1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

[fol. 17] (b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see *Richards* v. *United States*, supra, at page .; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19)[22] must be considered as a factor favoring transfer of the other cases pending in this District, so that

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is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from *Pearson, etc.* v. *Northeast Airlines, Inc.*, Civ. 147-142 in the U.S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to *Pearson*, supra, in *Trauth* v. *Northeast Airlines, Inc.* (S.D.N.Y., C.A. 149-256, 1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in *Trauth*, supra, is appended to the attached letter of 1/9/62 from counsel for General Motors.

[22] Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C.A. 30078, C.A. 30346 and C.A. 30284 contend that these wrongful death actions may not be transferred under 28 U.S.C.A. §1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought the actions there,[23] relying on *Hoffman* v. *Blaski*, 363 U.S. 335 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal representative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualification,[25] in *Boudreau* v. *New England* [fol. 18] *Transportation Company*, 315 Mass. 423, 426-7, 53 N.E. 2d 921, where the court said:

> "Even apart from any admission under G.L. (Ter. Ed.) c. 231, §30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured."

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

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[23] See *Boutillier* v. *Wesinger*, 322 Mass. 495, 496, 78 N.E. 2d 195 (1948).

[24] See Mass. Gen. Laws, Ch. 193, §§1 & 2, Ch. 194, §5, Ch. 195, §8, Mass. Ann. Laws, Ch. 204, §3.

[25] Cf. *Brennan* v. *Rooney*, 139 F. Supp. 484, 486-7 (E.D. Pa. 1956).

A. The District of Massachusetts is a District where Congress designated litigation of this type might be brought.

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (3rd Cir. 1951), which was quoted with approval in *Hoffman* v. *Blaski*, supra, at 343, states:

> "The district judge . . . had to decide whether the Northern District of Texas was a place where the suits 'might have been brought.' A reasonable and obvious way of determining this was to see whether Congress in some [fol. 19] other statute had designated the places where litigation of this sort might be brought.
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> * * * * * *
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> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (pp. 116 & 118).

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra.

For the reasons stated above, it is "in the interest of justice" and "for the convenience of . . . witnesses" that

these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U.S.C.A. §1404(a). See *Continental Grain Co.* v. *Barge FBL-585*, supra, at 22-24. In distinguishing *Hoffman* v. *Blaski*, supra, the court said at page 22 of the *Barge FBL-585 case*:

> "Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the 'civil actions' in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the [fol. 20] grain company to subject the owner of the barge, with or without its consent, to a 'civil action' in Memphis at the time the New Orleans action was brought."

In applying 28 U.S.C.A. §1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See *Greve* v. *Gibraltar Enterprises*, supra, at 412-3; cf. *Ackert* v. *Bryan*, F. 2d 30 L.W. 2310 (2nd Cir. 1962).

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See *Greve* v. *Gibralter Enterprises*, supra, at 414.[27]

Francis L. Van Dusen, J.

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[26] It is noted that "It is not necessary to aver the capacity of a party to sue or . . . the authority of a party to sue . . . in a representative capacity . . . " but such matters must be raised "by specific negative avertment. . . . ". See F.R. Civ. P. 9(a).

[27] There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U.S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

[fol. 21]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346.

SIDNEY W. POPKIN,

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP. and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions.

ORDER SUR MOTIONS TO TRANSFER—April 6 1962

(Documents Nos. 28, 29 & 30 in C.A. 28664; Nos. 30, 31 & 32 in C.A. 28741; Nos. 23, 24 & 25 in C.A. 28762; Nos. 26, 27 & 28 in C.A. 28763; Nos. 13 & 15 in C.A. 28764; Nos. 13 and 15 in C.A. 28788; Nos. 13 & 15 in C.A. 28789; Nos. 22, 23 & 24 in C.A. 29099; Nos. 12 & 14 in C.A. 29100; Nos. 22, 23 & 24 in C.A. 29159; Nos. 22, 23 & 24 in C.A. 29160; Nos. 11 & 13 in C.A. 29161; Nos. 11 & 13 in C.A. 29162; Nos. 22, 23 & 24 in C.A. 29274; Nos. 12 & 14 in C.A. 29275; Nos. 20, 21 & 22 in C.A. 29615; Nos. 9 & 11 in C.A. 29616; No. 9 in C.A. 29274; Nos. 15, 16 & 17 in C.A. 29768; Nos. 15, 16 & 17 in C.A. 29881; [fol. 22] Nos. 15, 16 & 17 in C.A. 29882; Nos. 15, 16 & 17 in C.A. 29883; Nos. 15, 16 & 17 in C.A. 29884; Nos. 8 & 11 in C.A. 29901; Nos. 21, 22 & 23 in C.A. 30078; Nos. 20, 21 & 22 in C.A. 30079; Nos. 11, 12 & 13 in C.A. 30200; No. 7 in C.A. 30230; No. 2 in C.A. 30258; Nos. 12, 13 & 14 in C.A. 30260; No. 2 in C.A. 30263; Nos. 9, 10 & 13 in C.A. 30266; Nos. 15, 16, 17 & 24 in C.A. 30284; No. 6 in C.A. 30288; No. 6 in C.A. 30289; Nos. 13, 14 & 15 in C.A. 30300; Nos. 13, 14 & 15 in C.A. 30301; No. 11 in C.A. 30302; No. 4 in C.A. 30303;

No. 2 in C.A. 30304; No. 11 in C.A. 30305; No. 2 in C.A. 30306; No. 12 in C.A. 30343; Nos. 13, 14 & 15 in C.A. 30344; Nos. 15, 16 & 17 in C.A. 30346)

And Now, April 6, 1962, It Is Ordered that the above-captioned cases are Transferred to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. §1404(a).

Francis L. Van Dusen, J.

See Opinion filed earlier today.

[fol. 23] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Civil Action No. 13994

BARRACK, Admx. of BARRACK; BROWNDORF, Admx. of BROWNDORF; GLICK, ARTHUR; GRANSDEN, Admr. of GRANSDEN; KING & BERKS COUNTY TRUST CO., Exects. of KING; MELTZER, Admx. of MELTZER; SCHWARTZ, Executrix of SCHWARTZ, M.; SCHWARTZ, Executrix of SCHWARTZ, T.; STALLER, Admx. of STALLER; WRIGHT, Admx. of WRIGHT,

—vs.—

HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania Ex Rel. EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORP., GENERAL MOTORS CORPORATION, and THE UNITED STATES OF AMERICA, Intervenors.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH —Filed April 6, 1962

To the Honorable, the Judges of the said Court:

The above captioned petitioners, by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, respectfully represent:

1. That they are residents and citizens of the Eastern District of Pennsylvania.

[fol. 24] 2. That on October 4, 1960, an airplane owned and operated by Eastern Air Lines, Inc., crashed into the waters of Boston Harbor upon take-off from Logan Airport in Boston, Massachusetts.

3. That petitioner, Arthur Glick was a passenger in said airplane at the time of said crash and that he sustained personal injuries as a result thereof.

4. That the other petitioners are the duly appointed personal representatives of Pennsylvania domiciliaries who were passengers on said airplane and whose deaths were the result of said crash.

5. That the said airplane at the time of said crash was en route to Philadelphia, Pennsylvania.

6. That actions to recover damages for said personal injuries and deaths were instituted by petitioners in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation, said actions being Civil Actions Nos. 29274, 29099, 28741, 28763, 29615, 28762, 29160, 29159, 30266, 30200, and against the United States of America, said actions being Civil Action Nos. 29275, 29100, 28764, 28789, 29616, 28788, 29162, 29161, 30263 and 30230.

7. That each of the parties sued is doing business in and is subject to service in the Eastern District of Pennsylvania and has been duly served.

[fol. 25] 8. That each of the parties sued moved for transfer of said actions to the United States District Court for the District of Massachusetts under 28 U.S.C.A., Section 1404 (a).

9. That said motions were opposed by petitioners.

10. That said motions were the subject of a hearing before the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, on December 15, 1961, and that order and

opinion has been filed on this date, April 6, 1962 a copy of which is attached hereto as Exhibit "A", granting the motions to transfer.

11. That a Massachusetts Punitive Statute limits recovery in wrongful death actions to between $2,000 and $20,000, to be assessed with reference to the degree of culpability of the defendant.

12. That when plaintiff and plaintiff's decedent are domiciliaries of Pennsylvania the Constitution and public policy of Pennsylvania preclude the Pennsylvania courts and, under *Erie* v. *Tompkins*, the federal courts sitting in Pennsylvania from giving effect to the punitive limitation on the recovery of damages in wrongful death actions contained in said Massachusetts statute, and require that the Pennsylvania rule of compensatory damages be applied.

13. That the transferee court, the United States District Court for the District of Massachusetts, may not give effect to or accord petitioners the benefit of the Constitution and public policy of Pennsylvania and may apply said Massachusetts Punitive Statute limiting recovery in wrongful death actions to the prejudice and irreparable harm of petitioners.

[fol. 26] 14. That Pennsylvania law and Pennsylvania public policy favoring the protection of Pennsylvania domiciliaries would follow the decision of the New York Court of Appeals in *Kilberg* v. *Northeast Air Lines, Inc.*, 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, 172 N. E. 2d 56 (1961) in which suit was brought in New York by a New York domiciliary for the wrongful death of a New York domiciliary in a Massachusetts airplane crash and in which the New York Court of Appeals held that the liability and damage provisions of the Massachusetts Statute were severable and that the application of the punitive restriction of the Massachusetts Statute was violative of New York public policy and that therefore unrestricted compensatory damages rather than the nominal punitive limitation imposed by Massachusetts law would govern.

15. That by reference to Pennsylvania law and Pennsylvania public policy the District Court in which the

within actions were filed would be bound to apply the rule of the *Kilberg* case, whereas upon transfer of the within causes to the District Court sitting in Massachusetts, the transferee court would not be so bound but on the contrary would likely ignore Pennsylvania law and Pennsylvania public policy and substitute instead the restrictive punitive provisions of the Massachusetts Statute.

16. That the transfer of said cases may thus deprive the petitioners, the survivors and next of kin of the decedents they represent, Pennsylvania domiciliaries all, of fundamental and substantial rights guaranteed them by the Pennsylvania Constitution and will violate the strong public policy of the Commonwealth of Pennsylvania which affords protection to its domiciliaries.

[fol. 27] 17. That transfer of the within causes of action to the Federal Court in Massachusetts constitutes a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it permits a non-resident defendant to engage in forum shopping not in fact for the convenience of parties or witnesses but for the purpose of obtaining a different rule of substantive law applicable to the measure of damages in the within causes of action.

18. That the order of transfer of the learned Judge below constitutes an abuse of discretion in that the public policy favoring the protection of petitioners as Pennsylvania domiciliaries under the substantive compensatory damage provisions of Pennsylvania vis-a-vis the restrictive punitive provisions of Massachusetts constitutes a consideration of such magnitude as to far outweigh any policy in the instant cases which would favor transfer as a matter of convenience for some of defendants' witnesses.

19. That the order of transfer constitutes an abuse of discretion in that and to the extent that the learned Judge below based his order of transfer on the conclusion that the proposed transferee district is "the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had. . . ." (Opinion of Hon. Francis L. Van Dusen, District Judge, filed April 6, 1962, page 13)

20. That petitioners know of no reason whatsoever why fair proceedings before trial and a fair trial for all parties may not be had in the United States District Court for the [fol. 28] Eastern District of Pennsylvania and with much greater likelihood that Pennsylvania's law and public policy as to compensatory damages and non-recognition of punitive statutes will be applied than if the causes are tried in a Federal Court sitting in Massachusetts.

21. That the private interest of the petitioner litigants, the interests of justice and convenience of witnesses and parties all balance overwhelmingly in favor of non-transfer.

22. That the order of transfer of the learned Judge below involves the transfer of cases to a transferee district whose applicable rule as to damages is violative of the law and public policy of the transferor forum.

23. That the transfer of said cases will cause extreme hardship to the petitioners, most of whom are widows with minor children, who will be forced thereby to move to Boston for an extended and indefinite period of time, and to bring with them, and compensate for their time and trouble, their witnesses, almost all of whom, particularly on the issue of damages, are Pennsylvania residents, and many of whom may decline to attend at Boston.

24. That the matters herein involved were fully briefed and argued before the learned Judge below and that petition for reargument with a view toward obtaining reversal of the order of transfer would be a futile and useless act.

25. That if said transfer is not restrained immediately, [fol. 29] said transfer may take place and this petition become moot, thus denying petitioners appellate review of the order to transfer.

Wherefore, petitioners by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, move the Court to issue forthwith an order temporarily restraining the Clerk of the District Court of the Eastern District of Pennsylvania from transferring said cases to the District of Massachusetts, and to grant a rule on the respondent, Hon. Francis L. Van Dusen, to show cause why a writ of man-

damus or prohibition, or both, should not issue prohibiting the transfer of said cases to the District of Massachusetts.

Respectfully submitted,

Richter, Levy, Lord, Toll & Cavanaugh, By: Elwood S. Levy, Counsel for Petitioners.

[fol. 30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, Deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, Deceased; ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR BOTH —Filed April 11, 1962

To the Honorable, the Judges of the Said Court:

Come now the petitioners in the above-captioned causes by their attorneys, Messrs. Freedman, Landy and Lorry,

filing this petition for Writ of Mandamus, Prohibition or Both against The Honorable Francis L. Van Dusen, District Judge for the Eastern District of Pennsylvania, and respectfully represent:

1. This petition is filed pursuant to 28 U.S.C., Sec. 1651.

2. The above-captioned causes of action arise from the crash of an airplane into the navigable waters of Boston Harbor in Massachusetts on October 4, 1960.

[fol. 31] 3. All of the defendants and/or respondents are doing business or have agreed to acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

4. Each of the defendants and/or respondents have moved for transfer to Massachusetts pursuant to 28 U.S.C., Sec. 1404(a).

5. Each of the plaintiffs and/or libellants have opposed the aforesaid motion for transfer.

6. On December 15, 1961, a hearing was held before Judge Van Dusen whereby arguments were propounded on both sides regarding the aforesaid motion to transfer.

7. By an opinion and order entered April 6, 1962, a copy of which is annexed hereto as Exhibit A, Judge Van Dusen granted the motion to transfer to the District Court sitting in Massachusetts.

8. The Massachusetts Wrongful Death Statute (Ann. Laws of Mass., Ch. 229, Sec. 3(a)) limits the amount of recovery for wrongful death to $20,000 and assesses liability on the degree of culpability.

9. The above plaintiffs and/or libellants are the personal representatives of decedents, who were Pennsylvania domiciliaries, except for one plaintiff who was a passenger of the plane and survived the crash, who is also a Pennsylvania domiciliary.*

* Except for the Abate case, Civil Action No. 30300 and 30307 and No. 335 of 1961 In Adm., wherein the personal representative

10. The constitution and public policy of Pennsylvania preclude a Pennsylvania court and/or a federal court sitting in Pennsylvania by diversity of citizenship jurisdiction from applying the aforementioned Massachusetts limitation on recovery to Pennsylvania domiciliaries, especially [fol. 32] when the contract of transportation was entered into in Pennsylvania, the beneficiaries of any recovery are Pennsylvania domiciliaries and the flight during which the tragedy occurred was returning to Pennsylvania.

11. It is highly probable that a federal court sitting in Massachusetts will not give effect to the aforementioned Pennsylvania policy as enunciated in its constitution and the decisions of its courts.

12. It is also highly probable that should the federal court sitting in Massachusetts seek to give effect to the aforementioned Pennsylvania public policy, that a jury of Massachusetts citizens dealing with a highly unfamiliar method of assessing damages and forced to apply dissimilar standards as between the Pennsylvania and the Massachusetts residents who were also passengers on the ill-fated flight would not award fair and just amounts to the personal representatives of the deceased Pennsylvania passengers in accordance with the Pennsylvania rules.

13. Petitioners submit that the Pennsylvania law and public policy as enunciated by the courts, legislature and Constitution of the Commonwealth of Pennsylvania (Art. III, Sec. 21) would follow the case of *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (N.Y. Court of Appeals, 1961), in denying the application of the restriction on recovery contained in the aforementioned Massachusetts Wrongful Death Statute.

14. By having these cases remain within the Eastern District of Pennsylvania petitioners are afforded an opportunity to have presented in sharpest focus to judges most familiar with the aforementioned Pennsylvania law

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of the decedent is a Massachusetts resident, as was the decedent, and the Braff case, Civil Action No. 29884 and 30304 and No. 327 of 1961 In Adm., in which the personal representative of the decedent is a New Jersey resident, as was the decedent.

and public policy the need and desirability of the application of the *Kilberg* doctrine thereto.

15. Petitioner respectfully submits that Judge Van Dusen abused his discretion under Sec. 28 U.S.C. 1404(a) [fol. 33] in failing to consider all of the elements enunciated in that statute and by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1946), and *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), in the following regards:

(a) He failed to properly weigh the importance of the Pennsylvania public policy regarding the compensatory nature of damages in that he erroneously assigned it only importance equal to the inconvenience that might be suffered to some of the defendants' witnesses.

(b) He failed to take cognizance of the fact that the eyewitnesses to the crash, most of whom reside in and about Boston, Massachusetts, are not important witnesses inasmuch as the controversy on the merits will revolve about the cause of the crash and not as to the fact of the crash itself.

(c) He failed to take cognizance of the fact that in weighing the relative convenience as between plaintiffs and/or libellants and defendants and/or respondents, the defendants and/or respondents, in view of the multi-state scope and nature of their activities, must be held to have contemplated being subject to suit in more than one jurisdiction.

(d) He failed to take cognizance of the fact that the transportation and/or availability of witnesses presents no real problem to the defendants and/or respondents while it represents enormous hardship to the plaintiffs and/or libellants.

[fol. 34] (e) He overemphasized, and in fact gave controlling weight, to the fact that consolidation of all the cases against all of the defendants and/or respondents could take place only in Massachusetts, while failing to take cognizance of the fact that it is universally agreed that consolidation should be denied

where the rights of the parties cannot be adequately protected thereby.

(f) He stated in his opinion (p. 13) that Massachusetts is the only place where a "fair trial" could take place, which the petitioners respectfully submit demonstrates that he did not adequately consider the fairness or unfairness as to the plaintiffs and/or libellants of a trial in Massachusetts.

(g) He failed to take cognizance and/or to assign proper weight to the fact that the Supreme Court has specifically stated that the claimant's selection of forum, when not chosen arbitrarily or for purposes of harassment, puts a "burden" upon the movant for transfer to justify the granting of his motion.

(h) He failed to take cognizance and/or to assign proper weight to the line of cases which held that in aviation disaster cases the courts have denied transfer and avoided consolidation where it would work severe hardship upon the claimants.

(i) As to the petitioner Sidney Popkin, who is a survivor of the crash, he failed to take cognizance of [fol. 35] the extra hardship that would be imposed, due to the fact that his witnesses concerning the extent of his damages and medical expenses, are all Pennsylvania residents.

16. All of these matters have previously been presented to the Court via argument and brief so that reargument would be futile.

17. The order granting transfer is not otherwise appealable.

18. Petitioners respectfully submit that immediate restraint is necessary so as to avoid transfer, and further to avoid having this petition become moot.

Wherefore, petitioners respectfully move this Honorable Court to issue a restraining order and to grant a rule on the respondent, The Honorable Francis L. Van Dusen, to show cause why a writ of mandamus, prohibition or both

should not issue prohibiting transfer of the above-captioned causes.

Freedman, Landy and Lorry, By: Milton M. Borowsky, Attorneys for Petitioners.

[fol. 36] *Duly sworn to by Milton M. Borowsky, jurat omitted in printing.*

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,003

HOWARD H. RAPP, Administrator of the Estate of RICHARD F. ZELLER, Dec'd., DONALD A. SCOTT, Administrator of the Estate of THOMAS L. MOODY, Dec'd., and NANCY A. FRANKENFIELD, Administratrix of the Estate of GEORGE B. FRANKENFIELD, JR., Dec'd, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR TEMPORARY STAY OF PROCEEDINGS AND WRIT OF MANDAMUS—Filed April 14, 1962

[fol. 38] To The Honorable Judges of Said Court:

Your petitioners respectfully ask this Honorable Court to issue Temporary Restraining Order and Writ of Mandamus in the form and for the reasons set forth below.

1. *Identity of Petitioners.*

Petitioners are Howard H. Rapp, Administrator of the Estate of Richard F. Zeller, Dec'd.; Donald A. Scott, Administrator of the Estate of Thomas L. Moody, Dec'd.; and Nancy A. Frankenfield, Administratrix of the Estate of George B. Frankenfield, Jr., Dec'd., each of whom is a

citizen of Pennsylvania and a resident of the Eastern District of this Commonwealth and each of whom has brought wrongful death and survival actions in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corporation and The United States of America, numbered respectively Civil Actions 30,078, 30,346 and 30,284.

2. *Relief Sought In This Court.*

Each Petitioner respectfully asks this Honorable Court (1) to issue an order directing a stay of all proceedings in each of the above numbered cases pending final disposition of this petition and (2) to issue a writ of mandamus directed to The Honorable Francis L. Van Dusen, Judge, directing said Respondent to vacate his Order Sur Motions to Transfer dated April 6, 1962, heretofore entered in each of said actions, transferring said actions to the United States District Court for the District of Massachusetts.

[fol. 39] 3. *The Grounds For This Petition.*

Petitioners respectfully assert that the entry of said order of transfer was contrary to law and therefore void for the reason that, as is more fully set forth below, said order was in contravention of §1404(a) of the Judicial Code which permits transfer of such an action only "to any other district . . . where it might have been brought", (28 U.S.C.A. §1404(a)) whereas the subject actions could not have been brought in Massachusetts.

4. *Summary Of The Factual Background Of This Petition.*

Each petitioner is a citizen of Pennsylvania and a resident of the Eastern District of said estate.

Each decedent died in the crash of an airplane in Boston, Massachusetts, on October 4, 1960, for which death each action is brought.

Each decedent died a resident of Pennsylvania with all of his assets located in this state.

Each petitioner is a fiduciary duly appointed by a Register of Wills of Pennsylvania. No petitioner has been appointed or licensed by any officer or agency of Massachusetts.

With the exception of actions in the Courts of Common Pleas of Philadelphia, since discontinued without prejudice by agreement, no petitioner has brought an action with respect to his decedent in any court other than the United States District Court for the Eastern District of Pennsylvania.

In the court below, defendants moved to transfer each case to the United States District Court for the District of Massachusetts and after argument Respondent granted said motions and entered the order above described.

[fol. 40] 5. *Why These Actions Could Not Have Been Brought In Massachusetts.*

(a) Under Massachusetts law an action for wrongful death must be brought within one year (Mass. Ann. Laws, ch. 229, §2) and may be brought only by the deceedent's executor or administrator (Mass. Ann. Laws, ch. 229, §2).

(b) Under Massachusetts law, an administrator appointed in another jurisdiction does not have the right to bring an action under the Massachusetts death statute. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2nd 195 (1948).

(c) In order to have the right to bring an action in Massachusetts, each of these fiduciaries would have had to petition the Probate Court of Massachusetts for a license to do so, making the commissioner of corporations and taxation a party to said petition and giving him 14 days' notice thereof (Mass. Ann. Laws, ch. 204, §3). The Probate Court might or might not eventually have seen fit to grant said petitions. Cf. *Morgan* v. *Morgan*, 267 Mass. 388, 166 N.E. 747 (1929).

In two of the instant actions, namely, the *Frankenfield* case, C. A. No. 30,284, and the *Scott* case, C. A. No. 30,346, the actions were commenced in this district less than 14 days before the expiration of one year from the date of death, and therefore not only was it impossible for these actions

to have been brought in Massachusetts on that date but it was also by then impossible for the plaintiffs to have obtained the necessary license even had they been obliged to try to do so.

[fol. 41] (d) The capacity of a representative plaintiff to sue in the United States District Court is to be determined by the law of the state in which the District Court is held. F.R.C.P. 17(b).

(e) In a recent removal case the Supreme Court of the United States affirmed the issuance of a writ of mandamus vacating an order for transfer, squarely upon the ground that a case cannot be transferred to another district unless that district be one in which the plaintiffs had the *right* (emphasis by the Supreme Court) to bring the action with or without consent of, or waiver of objection by, the defendants. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

(f) The learned and respected Respondent, in describing this issue at page 21 of this opinion of April 6, 1962, as "a close question", ordered transfer in partial reliance upon *Boudreau* v. *New England Transportation Company*, 315 Mass. 423, 53 N.E. 2d 921 (1944), which is clearly distinguishable from the instant cases in that there the defendant did not make a timely objection to the foreign fiduciary's lack of capacity to sue. But it is that very point which is squarely decided in favor of your petitioners' position by *Hoffman* v. *Blaski*, *supra*, which holds that the mere fact that defendants will waive their otherwise valid objections to the action does not meet the requirements of §1404(a) that the transferee jurisdiction be one in which the plaintiffs have the *right* to sue.

[fol. 42] (g) The learned Respondent also relied in part upon the case of *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), but that case also is not a valid guide in these proceedings inasmuch as the same parties to the transfer under §1404(a) in that case were already in litigation upon the same issues in the transferee district.

6. Copies of this petition have been served upon Respondent and counsel for each of the defendants in the proceedings below.

Wherefore Petitioners respectfully pray the issuance of the above order and writ.

Respectfully submitted,

Ralph Earle II, John R. McConnell, Attorneys for Petitioners.

Of Counsel: Morgan, Lewis & Bockius, 2107 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 43] *Duly sworn to by John R. McConnell, jurat omitted in printing.*

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14011

LEAH BIERNBAUM and DEWEY HOFFMAN Executors of the Estate of LEONARD BIERNBAUM, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE—Filed April 18, 1962

Krusen Evans and Byrne, 21 South 12th Street, Philadelphia 7, Penna., Attorneys for Petitioners.

[fol. 45] To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The petitioners herein are Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, having been so appointed by the Register of Wills of Montgomery County, Pennsylvania. Both petitioners are citizens and residents of the Commonwealth of Pennsylvania, and the decedent for whose estate they are executors was a

citizen and resident of the Commonwealth of Pennsylvania prior to and at the time of his death. The petitioners brought an action for wrongful death under Pennsylvania's Survival Act statute in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation which action was docketed in that Court as Civil Action No. 29768.

The plaintiffs' decedent was a passenger on an aircraft operated by one of the defendants as a common carrier which plane crashed near Logan International Airport, Boston, Massachusetts, on October 4, 1960.

After issue was joined, the defendants filed motions to transfer under 28 U.S.C.A. §1404(a), and on April 6, 1962, the Honorable Francis L. Van Dusen filed an opinion and thereafter entered an order transferring this and fifty-[fol. 46] four other cases from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts.

Thereafter, the Honorable Francis L. Van Dusen, on April 16, 1962, amended the Order of Court dated April 6, 1962, the effect of which amendment was to stay the transfer pending action by this Court.

The Relief Sought

The petitioners respectfully pray that this Honorable Court shall issue a rule upon the respondent, the Honorable Francis L. Van Dusen, directing that cause be shown why his order of April 6, 1962, directing transfer of the actions, should not be vacated. The effect of vacating the order to transfer would be to permit prosecution of this action in the United States District Court for the Eastern District of Pennsylvania rather than in the United States District Court for the District of Massachusetts.

Reasons Why the Petition Should Be Granted

As already appears, the petitioners have been appointed by the Register of Wills of Montgomery County of Pennsylvania and neither petitioner has been appointed or quali-

[fol. 47] fied as a fiduciary under the law of Massachusetts. The petitioners do not have the right to prosecute this action in Massachusetts under the laws of that Commonwealth. In order to have prosecuted any action in Massachusetts arising out of the death of the petitioners' decedent, the petitioners would have had to qualify before the probate court of Massachusetts and obtain ancillary appointment in that state. In any proceedings before the probate court of Massachusetts the Commissioner of Corporations and Taxations of that Commonwealth would have to be a party and notice served upon him pursuant to *Mass. Annotated Laws,* Chapter 204 §3.

The grant by the probate court of Massachusetts of the right to prosecute an action pursuant to the laws of that Commonwealth [*Mass. Annotated Laws,* Chapter 229 §2] is not a mere ministerial act, and the capacity of a person or persons, so situated as are the petitioners herein, must be determined pursuant to Federal Rule of Civil Procedure 17(b) by the law of the state in which the Federal District Court sits, in this case, Massachusetts. Therefore, the petitioners did not have the right to bring an action in a state or federal court in Massachusetts under the laws of that Commonwealth. Therefore, the provisions of 28 U.S. C.A. §1404(a) have not been met in the instant action for the reasons that the present plaintiffs in their present [fol. 48] respective capacity could not have brought an action in the District Court for the District of Massachusetts, the prospective transferee forum. Under 28 U.S.C.A. §1404 (a) an action may be transferred to another District if—and only if—the same action by the same plaintiffs could have been brought as a matter of right in the proposed transferee District.

Under *Massachusetts General Laws,* Chapter 231 §30, the defendants in the court below, had they been sued by the plaintiffs herein in Massachusetts, could have filed within ten days, or such further time as the court might allow, "a special demand" attacking the right of the plaintiffs herein to proceed in Massachusetts. This was recognized in the court below by the defendant, Lockheed Aircraft Corporation, for it there argued:

"It is clear that each of the instant administrators could have brought and maintained these actions in Massachusetts *unless the defendants made the demand contemplated by the statute.*" *Boutiller* v. *Wesinger*, 322 Mass. 495. [Emphasis Supplied]

[See P. 3, Supplemental brief for defendant Lockheed Aircraft Corporation in support of motion to transfer, filed in the District Court.]

Supreme Court decisions construing 28 U.S.C.A. §1404 (a), such as *Hoffman* v. *Blaski*, 363 U.S. 334, make it clear [fol. 49] that a prospective transferee district must be one in which the plaintiffs had the absolute *right* to maintain the action, with or without waiver of any rights the defendant might have had to make, or refrain from making, the demand contemplated by the Massachusetts statute.

It is clear from the Massachusetts statutes and decisions that the present plaintiffs might not, without further qualification and appointment as ancillary executors in Massachusetts, have maintained actions against the parties who were the defendants in the court below. The fact that the same two persons might [or might not] have been accepted in Massachusetts as qualified to bring an action and/or that the defendants might have waived their right to question the capacity of the petitioners as plaintiffs in an action in Massachusetts is demonstrative of the fact that there is serious question as to the correctness of the legal conclusions of the learned District Judge. Substantial rights of the petitioners and a large number of other persons, and substantial additional expense depleting the rights of the Estate or perhaps defeating such altogether, turn upon the question of transfer.

It is respectfully submitted that there are substantial legal questions involved; that appeal from the final judgment is not a sufficient and adequate remedy, and that petitioners' only remedy is by mandamus.

[fol. 50] Wherefore, the petitioners respectfully pray that this Honorable Court may issue a rule to show cause to the Honorable Francis L. Van Dusen, District Judge of the United States District Court for the Eastern District of Pennsylvania, directing that cause be shown why the order

of April 6th heretofore referred to should not be vacated and set aside.

Respectfully submitted,

Krusen Evans and Byrne, By T. E. Byrne, Jr., Attorneys for Petitioners.

[fol. 51] *Duly sworn to by T. E. Byrne, Jr., jurat omitted in printing.*

[fol. 52] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14033

DORIS A. LAISTER, as Executrix of the Estate of CHESTER H. LAISTER, Deceased, SELMA BIRENBAUM, ABE BIRENBAUM and ABRAM P. PIWOSKY, as Executors of the Estate of MARTIN BIRENBAUM, Deceased, and SYLVIA BARRACK, as the widow of MORRIS BARRACK, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of MORRIS BARRACK, Deceased, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND FOR TEMPORARY STAY OF PROCEEDINGS—Filed May 4, 1962

Abram P. Piwosky, Attorney for Plaintiffs Birenbaum & Sylvia Barrack, 1010 Lumberman's Bldg., Philadelphia 7, Pennsylvania.

[fol. 53] David M. Hass, Attorney for Plaintiff Doris A. Laister, 1530 Chestnut Street, Philadelphia 2, Pennsylvania.

Of counsel: Lee S. Kreindler, Kreindler & Kreindler, 51 Chambers Street, New York 7, New York.

[fol. 54] To the Honorable Judges of Said Court:

Your Petitioners respectfully ask this Honorable Court to issue a writ of mandamus or prohibition and to issue a temporary restraining order in the form and for the reasons set forth below.

I. *Identity of Petitioners.*

Petitioners are the personal representatives of three decedents killed in the crash of an Eastern Air Lines Electra aircraft in Boston, Massachusetts, on October 4, 1960. Each of them has brought an action for wrongful death against the sole defendant, Eastern Air Lines, Inc., in the United States District Court for the Eastern District of Pennsylvania. The actions are respectively numbered Civil Action Numbers 29724, 30288, and 30289. Each of the decedents was a citizen and resident of Pennsylvania, and each of the Petitioners is a citizen of Pennsylvania, except for Doris A. Laister, who was a citizen of Pennsylvania at the time the said action was started, but who has since moved to the State of Florida.

II. *Relief Sought in this Court.*

Each Petitioner respectfully asks this Honorable Court (1) to issue a writ of mandamus or prohibition directed to [fol. 55] the Honorable Francis L. Van Dusen, Judge, directing said Respondent to amend his order sur motions to transfer dated April 6, 1962, at least with respect to the actions brought by these petitioners, as requested in the Petitioners' motion to amend said order (which motion was denied by the said Judge Van Dusen on April 27, 1962), or, in the alternative, directing said Respondent to vacate said order of transfer; and (2) to issue an order directing a stay of all proceedings in each of the above numbered cases pending a final disposition of this Petition, and if this Petition is denied, pending a disposition of a Petition for a writ of certiorari to the United States Supreme Court.

III. *The Order of Transfer Dated April 6, 1962.*

In an Order dated April 6, 1962 the Respondent, the Honorable Francis L. Van Dusen, Judge, directed that the

said three actions, along with many other actions arising out of the same airplane crash, be transferred to the United States District Court for the District of Massachusetts.

IV. *The Petitioners' Motion to Amend Said Order of Transfer.*

The Petitioners thereafter moved, in the United States District Court for the Eastern District of Pennsylvania, before said Respondent to have the said Order of Transfer amended, by adding to said Order either or both of the following provisions:

[fol. 56] (1) That this order of transfer is conditioned upon the consent by the defendant, Eastern Airlines, Inc., to the application of Pennsylvania public policy refusing to enforce any limitation of damages for wrongful death, if such a public policy has been enunciated by a Pennsylvania State Court prior to the termination of this litigation.

(2) It Is Also Ordered that damages in these cases be awarded without limitation and consistent with Pennsylvania public policy to that effect, if said public policy has been enunciated by a Pennsylvania State Court prior to a termination of this litigation.

V. *Reasons for the Motion to Amend.*

(a) Without such an amendment (or such amendments) there is a serious question of law as to whether the transferee court (the District Court of Massachusetts) would have the power to enforce Pennsylvania public policy if such becomes appropriate.

(b) The first suggested amendment would enable the District Court in Massachusetts to enforce Pennsylvania public policy (if such becomes appropriate by virtue of the Pennsylvania State Court following the *Kilberg* doctrine) since that Court would have the power to enforce what would be, in effect, a stipulation of the parties, and since the defendant, Eastern Air Lines, Inc., would be estopped from resisting the application of said Pennsylvania public policy.

(c) The second proposed amendment would have the effect of giving the District Court of Massachusetts the [fol. 57] power to enforce Pennsylvania public policy (again, if such becomes appropriate), since it would establish the law of the case which the transferee court would have the power to follow.

(d) The Supreme Court of the United States has never decided the difficult question of whether the transferee court follows the law of the state of the forum or the law of the transferor state.

(e) In the absence of such a determination by the Supreme Court of the United States the question is in doubt and the Petitioners' rights are in jeopardy.

(f) Without such protective amendments the Petitioners in these actions may find themselves denied the benefits of Pennsylvania public policy. This would be a denial of both equal protection of the laws and due process of law, since other plaintiffs (in Pennsylvania State Courts) similarly situated would have the benefit of Pennsylvania policy, while these plaintiffs would not.

VI. *Pennsylvania's public policy will be pronounced by the Pennsylvania State Court.*

In the case of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 526 (1961) the highest court of the State of New York (The Court of Appeals) held that the Massachusetts limitation of damages for wrongful death was contrary to New York's public policy, [fol. 58] and would not be enforced, although the right of action for wrongful death created by Massachusetts law would be enforced by New York courts.

In the actions commenced by the Petitioners herein, in the United States District Court for the Eastern District of Pennsylvania, the assertion is made that Pennsylvania's public policy is the same as New York public policy, as expressed in *Kilberg*.

In two other actions arising out of the same Eastern Air Lines' Boston accident (both entitled Shackton v. Eastern Air Lines, Inc.,) brought and currently pending in the

Pennsylvania State Court (The Court of Common Pleas) the same question of Pennsylvania public policy has been raised.

The possibility that the Pennsylvania State Courts, in the Shackton cases, or in other cases raising the same question, will decide that Pennsylvania public policy is the same as New York's public policy, expressed in *Kilberg* is expressly recognized in the opinion of the Respondent, in the District Court, below, on transfer (pages 18-19 of the Opinion).

VII. *The Power of the Transferee Court to Enforce Pennsylvania public policy is in doubt.*

The serious difficulty presented by Respondent's order of transfer, as it now stands, lies in the possibility that the transferee court may not have the *power* to apply Pennsylvania public policy once the case has been transferred *unless* Respondent has made such application of Pennsyl- [fol. 59] vania public policy the law of the case, or unless the defendant below, Eastern Air Lines, Inc., has consented to such application.

There is a serious question as to whether or not the transferee court must apply the law (and particularly the public policy) of the state in which *it* sits or the law (including the public policy) of the transferor state. Since the question is so important in the administration of the Federal Courts it would seem obvious that the question cannot be considered resolved until it has been finally determined by the Supreme Court of the United States. If such a determination is ultimately made—to the effect that the transferee court will apply the public policy of the transferee state, and if in the meantime Pennsylvania has followed *Kilberg*, the transfer will have created the anomalous result (and perhaps the unconstitutional result) that Pennsylvania citizens who have brought their cases in Federal Courts in Pennsylvania simply because their citizenship is diverse to the citizenship of the defendant are denied the benefits of Pennsylvania public policy, while other Pennsylvania citizens obtain the benefits of Pennsylvania policy in Pennsylvania State Courts.

The problem that the court below has created becomes graphic if one assumes, for the moment, that Pennsylvania has followed the *Kilberg* doctrine. Certainly if Pennsylvania State Courts had pronounced this doctrine it would be wrong, and probably unconstitutional, to transfer these [fol. 60] cases to Massachusetts, so long as there is any doubt about the ability of the transferee court to follow Pennsylvania courts in applying the *Kilberg* doctrine.

The least Respondent can do, having once decided to transfer these cases to Boston, would seem to be to protect, as far as possible, the rights of the Petitioners under Pennsylvania public policy. This can be accomplished by the proposed amendments to the order of transfer, which would condition the transfer on a stipulation by the defendant airline to have Pennsylvania public policy applied, and/or to make the application of Pennsylvania public policy the law of the case.

Certainly this would strengthen, if not insure, the transferee court's ability to apply Pennsylvania public policy.

VIII. *The Unsettled Question of The Law to be Applied by the Transferee Court.*

The Respondent, Judge Van Dusen, did not intend to deprive the Petitioners of the benefits of Pennsylvania public policy if such public policy is enunciated before the termination of the litigation. In his order denying the motion to amend the order of transfer he indicates that to him it appears that the transferee district will follow the law of the transferor district, including its public policy. The difficulty, however, is that the transferee court may not have the *power* to do so.

Briefly stated, the problem arises out of the basic proposition established by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) that a federal district court must apply the substantive law of the state in which it sits. This substantive [fol. 61] law includes its conflict of laws rules, *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) and it also includes the public policy of the state in which it sits, *Griffin* v. *McCoach*, 313 U.S. 498 (1941); and *Angel* v. *Bullock*, 330 U.S. 183 (1947). Thus it would seem initially, and

basically, from these important Supreme Court decisions that the transferee court (the District Court of Massachusetts) in this case, would be obliged to follow the public policy of Massachusetts, rather than Pennsylvania, the transferor state.

The specific question has not, however, been decided by the Supreme Court of the United States.

The cases in which the question has come up are not too helpful. First, most of them involve statute of limitations questions where there has been an element of reliance by the plaintiff on the statute of limitations of the transferor state, and where there has thus been impetus to the courts to apply the transferor's law. The statute of limitations cases are therefore not a good guide to the ultimate determination of conflict of laws with respect to public policy.

Secondly, most of the cases are decisions by the transferor court, which may or may not have been followed by the transferee court. The question of the *power* of the transferee court to apply the public policy of the transferor state, has not really been adequately raised. Nevertheless, it has been held, or at least strongly suggested that the transferee court *must* apply the law (including [fol. 32] the public policy) of the state in which *it* sits, rather than the law of the transferor state, *Reynolds* v. *Baltimore & Ohio Railroad Co.*, 185 F.2d 27 (7th Cir. 1950) cert. den. 340 U.S. 947 (1951); *Boughton* v. *Shoulders*, 116 F.Supp. 391 (W.D. Ky. 1953); *Viaggio* v. *Field*, 177 F.Supp. 643 (DC Md. 1959); *Frechoux* v. *Lykes Brothers S.S. Company, Inc.*, 117 F.Supp. 234 (SD NY 1953); *Crawford* v. *The S.S. Shirley Lykes*, 148 F.Supp. 958 (SD NY 1957); *Kaufman, Observations on Transfers under Section 1404(a) of the New Judicial Code*, 10 FRD 595.

The cases cited on page 15 of the lower court's opinion on transfer suggest or indicate that, at least in statute of limitations situations, the transferee court will follow the law of the transferor, *Headrick* v. *Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305, 309-310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F.Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F.Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibraltar Enterprises*, 85 F.Supp. 410, 414 (D. New Mex. 1949). There is thus authority both ways.

There is authority, however, for the proposition that the courts will follow the "law of the case" doctrine in transfer cases. In 1 Moore, Section 4201 et seq. it is stated:

> "When, therefore, a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases . . . but, as a general proposition, it establishes the law, which other courts owing obedience to it *must*, and which it itself will, normally apply to the same issues in subsequent proceedings in that case."

[fol. 63] And, with specific reference to transferred actions, Professor Moore states (1 Moore 0.404[8]):

> "ordinarily one judge does not consider a point previously decided by another judge of coordinate jurisdiction, and hence such pre-transfer rulings should ordinarily stand. But departure from a prior ruling, just as in any other law of the case situation, is at times warranted."

Further support for the proposition that a specific ruling by Respondent to the effect that Pennsylvania public policy will apply, will aid the transferee court in following such public policy is found in the words of Judge Learned Hand, in *Magnetic Engineering Co.* v. *Dings Manufacturing Co.*, 178 F.2d 866, 868 (2d Cir. 1950):

> "When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has already been done."

IX. *A Writ of Mandamus is Thus Necessary to Protect Petitioners' Rights.*

As matters now stand Petitioners' actions will be transferred to the United States District Court for the District of Massachusetts without Petitioners having any assurance that the Court can or will enforce Pennsylvania public policy, if such policy has been pronounced by Pennsylvania State Courts. Petitioners, and the beneficiaries of these

actions, may, therefore, suffer irreparable harm by virtue of this transfer. Petitioners therefore ask this Court to issue a writ of mandamus directing the Honorable Francis L. Van Dusen, Judge, to modify the order of transfer so as to provide protection to the Petitioners, or, in the alterna-
[fol. 64] tive, directing the Respondent to vacate the order of transfer.

X. *A Stay is Necessary to Prevent Transfer While this Petition is Being Considered.*

Petitioners respectfully request this Court to issue a temporary restraining order staying the order of transfer until this Court has had an opportunity to consider this Petition. In addition Petitioners request that this Court, if it decides to deny this Petition, stay the transfer until Petitioners have had an opportunity to take the question to the Supreme Court of the United States. There would appear to be a serious possibility of the Supreme Court granting review, because of the importance of the question in terms of Federal jurisdiction, practice, and procedure, and because of the Supreme Court's primary responsibility for the administration of justice in the Federal Courts.

XI. *Copies of this Petition Have Been Served Upon Respondent and Counsel for the Defendant in the Proceedings Below.*

Wherefore, Petitioners respectfully pray the issuance of the above order and writ.

Respectfully submitted,

Abram P. Piwosky, David M. Hass, Attorneys for Petitioners. Of counsel: Lee S. Kreindler, Kreindler & Kreindler, 51 Chambers Street, New York 7, New York.

[fol. 65] *Duly sworn to by Lee S. Kreindler, jurat omitted in printing.*

[fol. 66] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al.,

v.

HONORABLE FRANCIS L. VAN DUSEN, *ex rel.*
EASTERN AIR LINES, INC., et al.

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

ORDER DENYING PETITION—April 10, 1962

And Now, to wit, this 10th day of April, 1962, it is

Ordered that the temporary restraining order entered herein on April 6, 1962 be and the same hereby is vacated and set aside; and it is

Further Ordered that the petition for mandamus or prohibition or both filed herein on April 6, 1962 be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[fol. 67] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, deceased; ATTILO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, co-executors of the Estate of ADDISON B. FREEMAN, JR., deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, deceased, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

ORDER DENYING PETITION—April 12, 1962

Upon consideration of the petition for writ of mandamus, prohibition, or both, filed in the above case;

It is Ordered that the petition be, and it is hereby denied.

By the Court,

William H. Hastie, Circuit Judge.

[fol. 68] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al.
v.
HONORABLE FRANCIS L. VAN DUSEN, *ex rel.*
EASTERN AIR LINES, INC., et al.

PETITION FOR RE-HEARING FOR WRIT OF MANDAMUS OR PROHIBITION BEFORE THE ENTIRE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT—Filed April 11, 1962

To the Honorable, the Judges of the Said Court:

The above captioned petitioners, by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, respectfully represent:

1. That on April 6, 1962 they did file a Petition for Writ of Mandamus or Prohibition to restrain the Honorable Francis L. Van Dusen from transferring ten cases, nine of which are Wrongful Death and Survival actions against the Eastern Airlines, Inc., General Motors Corporation, Lockheed Aircraft Corp., and ten separate cases by the same plaintiffs against the United States of America for damages arising out of a crash by an Eastern Airlines plane at or near Logan Airport in Boston, Massachusetts.

2. All of these persons had purchased tickets from Philadelphia to Boston and back on the said airline.

[fol. 69] 3. That all of the petitioners are residents and citizens of the Eastern District of Pennsylvania.

4. That the petitioners are the duly appointed personal representatives of Pennsylvania domiciliaries who were

passengers on said airplane and whose deaths were the result of the said crash.

5. That the said airplane at the time of said crash was en route to Philadelphia, Pennsylvania.

6. That actions to recover damages for said personal injuries and deaths were instituted by petitioners in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation, said actions being Civil Actions Nos. 29274, 29099, 28741, 28763, 29615, 28762, 29160, 29159, 30266, 30200, and against the United States of America, said actions being Civil Action Nos. 29275, 29100, 28764, 28789, 29616, 28788, 29162, 29161, 30263 and 30230.

7. That each of the parties sued is doing business in and is subject to service in the Eastern District of Pennsylvania and has been duly served.

8. That the defendants herein named have moved for transfer to the United States District Court in Massachusetts under 28 U.S.C.A. Section 1404(a), which motions were opposed by the petitioners.

[fol. 70] 9. That a Massachusetts Punitive Statute limits recovery in wrongful death actions to between $2,000 and $20,000, to be assessed with reference to the degree of culpability of the defendant.

10. That when plaintiff and plaintiff's decedent are domiciliaries of Pennsylvania the Constitution and public policy of Pennsylvania preclude the Pennsylvania courts and, under *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), the federal courts sitting in Pennsylvania from giving effect to the punitive limitations on the recovery of damages in wrongful death actions contained in said Massachusetts statute, and require that the Pennsylvania rule of compensatory damages be applied.

11. That the transferee court, the United States District Court for the District of Massachusetts, may not give effect to or accord petitioners the benefit of the Constitution and

public policy of Pennsylvania and may apply said Massachusetts Punitive Statute limiting recovery in wrongful death actions to the prejudice and irreparable harm of petitioners.

12. That Pennsylvania law and Pennsylvania public policy favoring the protection of Pennsylvania domiciliaries would follow the decision of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 56 (1961), in which suit was brought in New York by a New York domiciliary for the wrongful death of a New York domiciliary in a Massachusetts airplane crash and in which the New York Court of Appeals held that the liability and damage provisions of the Massachusetts Statute were severable and that the application of the punitive restriction of the Massachusetts Statute was violative of New York public policy and that therefore unrestricted compensatory damages [fol. 71] rather than the nominal punitive limitation imposed by Massachusetts law would govern.

13. That by reference to Pennsylvania law and Pennsylvania public policy the District Court in which the within actions were filed would be bound to apply the rule of the *Kilberg* case, whereas upon transfer of the within causes to the District Court sitting in Massachusetts, the transferee court would not be so bound but on the contrary would apply the measure of damages provided by the penal death statute of the law of Massachusetts since Massachusetts has no compensatory wrongful death statute.

14. That the transfer of the said cases will thus deprive the petitioners, the survivors and next of kin of the decedents they represent, Pennsylvania domiciliaries all, of fundamental and substantial rights guaranteed them by the Pennsylvania Constitution and will violate the strong public policy of the Commonwealth of Pennsylvania which affords protection to its domiciliaries. The net result will be that instead of being awarded fair compensatory damages in the Eastern District of Pennsylvania, these widows and orphans will now be forced to travel to Massachusetts and will receive only the maximum of $20,000 under the Massachusetts Penal Statute.

15. That transfer of the within causes of action to the Federal Court in Massachusetts constitutes a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it permits a non-resident defendant to engage in forum shopping not in fact for the convenience of parties or witnesses but for the purpose of obtaining a different rule of substantive law applicable to the measure of damages in the within causes of action.

[fol. 72] 16. That the order of transfer of the learned Judge below constitutes an abuse of discretion in that the public policy favoring the protection of petitioners as Pennsylvania domiciliaries under the substantive compensatory damage provisions of Pennsylvania vis-a-vis the restrictive punitive provisions of Massachusetts constitutes a consideration of such magnitude as to far outweigh any policy in the instant cases which would favor transfer as a matter of convenience for some of defendants' witnesses.

17. That the order of transfer constitutes an abuse of discretion in that and to the extent that the learned Judge below based his order of transfer on the conclusion that the proposed transferee district is "the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had . . ." (Opinion of Hon. Francis L. Van Dusen, District Judge, filed April 6, 1962, page 13).

18. That petitioners know of no reason whatsoever why fair proceedings before trial and a fair trial for all parties may not be had in the United States District Court for the Eastern District of Pennsylvania and with much greater likelihood that Pennsylvania's law and public policy as to compensatory damages and non-recognition of punitive statutes will be applied than if the causes are tried in a Federal Court sitting in Massachusetts.

19. That the private interest of the petitioner litigants, the interests of justice and convenience of witnesses and parties all balance overwhelmingly in favor of non-transfer.

[fol. 73] 20. That the order of transfer of the learned Judge below involves the transfer of cases to a transferee

district whose applicable rule as to damages is violative of the law and public policy of the transferor forum.

21. That the transfer of said cases will cause extreme hardship to the petitioners, most of whom are widows with minor children, who will be forced thereby to move to Boston for an extended and indefinite period of time, and to bring with them, and compensate for their time and trouble, their witnesses, almost all of whom, particularly on the issue of damages, are Pennsylvania residents, and many of whom may decline to attend at Boston.

22. That the matters herein involved were fully briefed and argued before the learned Judge below and that petition for re-argument with a view toward obtaining reversal of the order of transfer would be a futile and useless act.

23. The action of the District Judge in transferring these cases to Boston was predicated upon an Opinion in which it became clear that he weighed the alleged inconveniences to witnesses without having first resolved and decided the basic and original issue of law presented, to wit: would the law that the Massachusetts Court would apply as to the measure of damages be the same as the law which the Eastern District of Pennsylvania would be obliged to apply. If your petitioners would not get the benefit of the same applicable law in the transferee forum as it would get in the transferor forum, then obviously an injustice would be done by transfer and the Court [fol. 74] would have no reason to ever reach the question of inconvenience of witnesses at all.

24. The Honorable John C. Biggs, C.J. and Goodrich and Hastie, JJ., on April 10, 1962 did deny the petition without a hearing and without indicating whether their action was based on the view that the Mandamus or Prohibition does not lie or on the view that the action of the lower Court on the substantive question of whether an injustice would be done the plaintiffs by transfer was correct.

Wherefore, your petitioners respectfully requests that this matter be circulated to all the Judges of the United States Court of Appeals for the Third Circuit for their

deliberation and for such action as is properly indicated upon consideration of the facts set forth hereinabove. Your petitioner further requests that if this petition is denied, the Court respectfully indicate the ground upon which such denial is based.

Respectfully submitted,

Richter, Levy, Lord, Toll & Cavanaugh, By B. Nathaniel Richter, Counsel for Petitioners.

[fol. 75]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, Deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, Deceased; ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

Petition for Rehearing Before the Court en Banc—Filed April 14, 1962

To the Honorable, the Judges of the Said Court:

The plaintiffs, by their attorneys, Messrs. Freedman, Landy and Lorry, respectfully petition to have this court en banc re-consider the petition for writ of Mandamus, Prohibition or both, to be issued directing the Honorable Francis L. Van Dusen, Judge of the Eastern District of Pennsylvania, to vacate his order transferring the above-captioned causes to Massachusetts pursuant to 28 U.S.C., Sec. 1404 (a), and in support represent as follows:

1. The above-captioned causes arise from the crash of an airplane into the navigable waters of Boston harbor in [fol. 76] Massachusetts on October 4, 1960, just after the start of a flight whose destination was Philadelphia.

2. All of the defendants are doing business or have agreed to the acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

3. The plaintiffs are the personal representatives of decedents who were Pennsylvania domiciliaries (as are the beneficiaries of any recovery), except for the Abate case, Civil Action Nos. 30300 and 30307 and the Braff Case, Civil Action Nos. 29884 and 30304 and for one plaintiff who although a Pennsylvania domiciliary survived the crash.

4. Each of the defendants moved for transfer to Massachusetts pursuant to 28 U.S.C., 1404(a).

5. Each of the plaintiffs opposed the motion to transfer.

6. On December 15, 1961, a hearing was held before Judge Van Dusen whereby arguments were propounded on both sides regarding the motion to transfer.

7. By an opinion and order entered April 6, 1962, Judge Van Dusen transferred the above causes to Massachusetts.

8. On April 10, 1962, plaintiffs presented a petition before this court for a writ of mandamus, prohibition or both, pursuant to 28 U.S.C., Sec. 1651, asking that Judge Van Dusen be directed to vacate the transfer order.

[fol. 77] 9. On April 12, 1962, three members of this Honorable Court, Judges Biggs, Hastie and Goodrich, summarily denied this petition, per curiam.

10. The summary denial of the plaintiff's petition will result in irreparable prejudice to their substantial rights and therefore they request leave to present written and oral argument in support of the petition.

11. The nexus of petitioners' earnest desire to retain these cases within the third circuit is the Massachusetts Wrongful Death Statute (Ann. Laws of Mass., Ch. 229, Sec. 3(a)), which limits the amount of recovery to $20,000.00 and assesses his liability on the degree of culpability.

12. Petitioners submit that the Pennsylvania law and public policy as enunciated by its courts, legislature and constitution (Article III, Sec. 21) would follow the case of *Kilberg* v. *Northeastern Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (N.Y. Ct. of Appeals, 1961) in denying the application of the restriction on recovery contained in the aforementioned Massachusetts Wrongful Death Statute. This contention is grounded upon the fact that the same considerations existing herein as existed in the Kilberg case; to wit, a public policy of the domiciliary state directly contra to that of Massachusetts, the plaintiffs, decedents, and beneficiaries of any recovery being citizens of the forum state; the contract of transportation having been entered into in [fol. 78] Pennsylvania; the situs of the crash being solely fortuitous; and the flight's destination being Pennsylvania.

13. It is highly probable that a federal court sitting in Massachusetts will not give the fullest effect to the aforementioned Pennsylvania public policy.

14. It is also highly probable that should a federal court sitting in Massachusetts seek to give effect to the aforementioned Pennsylvania public policy and to charge a jury to apply the "Kilberg doctrine" a jury of Massachusetts citizens dealing with a highly unfamiliar method of assessing damages and forced to apply dissimilar standards as between the Pennsylvania and the Massachusetts residents who were also passengers on the ill-fated flight would not

award fair and just amounts to the personal representatives of the deceased Pennsylvanians.

15. Petitioners submit that unless immediately reviewed, the transfer order will as a practical matter never be reviewed at all, as this court has previously noted. *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, (1951) cert den 71 S. Ct. 572; *Pennsylvania Turnpike Commission* v. *Welsh*, 188 F. 2d 447 (1951). Also, see *In Re Josephson*, 218 F. 2d 174, 181-183 (C.A. 1, 1954).

16. Petitioners further submit that there is here presented an "extraordinary situation," [1] as the practical effect [fol. 79] of the transfer order is to deprive petitioners of any real opportunity to attain a just measure of compensation. Aside from the fact that the convenience of neither the plaintiffs nor the witnesses will actually be served should trial be held in Massachusetts, plaintiffs would also be forced to seek to convince the one court to whom a $20,000.00 maximum evaluation of life is a familiar and perhaps ordinary occurrence to overrule the Massachusetts statute. Assuming the detachment and impartiality of a federal judge could achieve that result, petitioners are then faced with a jury of Massachusetts citizens who will be told they must limit recovery for the deaths of the large block of Massachusetts passengers, but should steadfastly ignore that limitation as to the Pennsylvanians. The natural tugs of symmetry and the bewilderment and sense of injustice that laymen must inevitably feel could easily lead them to choose the convenient refuge of similar or uniform awards to the serious detriment of the Pennsylvanians.

17. Petitioners respectfully submit that Judge Van Dusen abused the discretion afforded him by way of 28 U.S.C., Sec. 1404(a), and this can only be demonstrated

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[1] *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947), *In Re Josephson*, *supra*, *Clayton* v. *Warlick*, 232 F. 2d 699 (C.A. 4, 1956), *Pan Handle Eastern Pipe Line Co.* v. *Thornton*, 267 F. 2d 459 (C.A. 6, 1959), *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 264 (1957) (where Justice Brennan, speaking for himself and Justices Frankfurter, Harlan, and Burton specifically approve the use of mandamus to immediately correct an erroneous transfer order).

to this court by written and oral argument as "extraordinary situation" is by definition incapable of prior formulation. Petitioners would point out, however, that there [fol. 80] is a substantial body of law, holding that failure to consider and/or discuss all the elements in 28 U.S.C., Sec. 1404 (a) and *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 509 (1946) is an abuse of discretion justifying mandamus. *Wiren* v. *Laws,* 194 F. 2d 873 (D.C. Cir. 1951); *Gulf Research and Development Co.* v. *Harrison,* 185 F. 2d 457 (C.A. 9, 1950); *Comfort Equipment Co.* v. *Steckler,* 212 F. 2d 371 (C.A. 7, 1954); *A. C. Neilsen Co.* v. *Hoffman,* 270 F. 2d 693 (C.A. 7, 1959); see cases cited in footnote.

18. Petitioners respectfully submit that all of the considerations against transfer, if brought to the attention of this court by way of written and oral argument, as they were presented to Judge Van Dusen, would make it manifestly clear that transfer was inappropriate and presents extraordinary hardship upon the plaintiffs and, therefore, constitutes an abuse of the District Court's discretion.

19. The order granting transfer having been held by this court to be not otherwise appealable, and by its very nature not appealable at any other stage of the litigation or in any other court, this petition is the plaintiffs' sole opportunity to vindicate their contention.

20. Petitioners respectfully submit that immediate restraint is necessary so as to avoid transfer and having this petition become moot.

Wherefore, petitioners respectfully move this Honorable [fol. 81] Court to issue a restraining order and to grant a rule on the respondent, the Honorable Francis L. Van Dusen to show cause why a writ of mandamus, prohibition or both should not be issued prohibiting transfer of the above-captioned causes, and reconsidering this matter en banc, giving the plaintiffs the opportunity to present argument.

Respectfully submitted,

Freedman, Landy and Lorry, By: Milton M. Borowsky, Attorneys for Petitioners.

[fol. 82] *Duly sworn to by Milton M. Borowsky, jurat omitted in printing.*

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14003

RAPP, Administrator, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE, Circuit Judges.

ORDER STAYING TRANSFER—April 23, 1962

It is Ordered that the orders of the United States District Court for the Eastern District of Pennsylvania, transferring Civil Actions Numbers:

29274	28664	30078	29768	29724
29099	29881	30346		30079
28741	29882	30284		30288
28763	29883			30289
29615	29884			
28762	29901			
29160	30257			
29159	30258			
30266	30259			
30200	30260			
29275	30300			
29100	30301			
28764	30302			
28789	30303			
29616	30304			
28788	30305			
29162	30306			
29161	30307			
30263	30343			
30230	30344			

to the United States District Court for the District of [fol. 84] Massachusetts be and the same are hereby stayed until further order of this Court.

Biggs, Chief Judge.

By the Court,

Dated: April 23, 1962

[fol. 85] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13994

ROBERTA BARRACK, Administratrix of the estate of JACK M. BARRACK, deceased, et al., petitioners,

vs.

HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania, et al.

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING, ETC.—
June 12, 1962

It is Ordered that:

1. the petition for rehearing in the above entitled case be and it hereby is granted;
2. the order of April 10, 1962 denying the petition for writ of mandamus or prohibition be and it hereby is vacated.

By the Court,

Biggs, Chief Judge.

[fol. 86] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14003

RAPP, Administrator, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, Executrix, etc., et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

Order re Filing of Answers, etc.—June 12, 1962

Upon consideration of the petitions for writs of mandamus and prohibition filed in the above entitled cases,

It is Ordered that:

1. the respondent, the Honorable Francis L. Van Dusen, file answers to the petitions on or before June 28, 1962, and if he deems it desirable, file one consolidated answer to all of the petitions;

2. the defendants in the Civil Actions in the District Court, Eastern Airlines, Inc., Lockheed Aircraft Corp., General Motors Corporation and the United States of America, be and they hereby are granted leave to intervene;

3. the petitioners in each of the above entitled cases file and serve the briefs and appendices in their respective cases on or before July 28, 1962;

[fol. 87] 4. the respondent and intervenors file and serve their briefs and appendices on or before August 27, 1962, which briefs and appendices, if they deem it desirable, may be joint and consolidated for all the cases;

5. the petitioners file and serve their reply briefs, if any, on or before September 11, 1962;

6. the Clerk schedule the above cases for oral argument at a session in September, 1962.

By the Court,

Biggs, Chief Judge.

Dated: June 12, 1962

[fol. 88] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13997

SIDNEY W. POPKIN, et al., petitioners

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania, et al.

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING, ETC.—
June 12, 1962

It is Ordered that:

1. the petition for rehearing in the above entitled case be and it hereby is granted;
2. the order of April 12, 1962 denying the petition for writ of mandamus or prohibition be and it hereby is vacated.

By the Court,

Biggs, Chief Judge.

[fol. 89] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14,003

RAPP, Administrator, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

BIERNBAUM, et al., Executors, etc., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

LAISTER, Executrix, etc., et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

Answer of Respondent to Petitions for Writs of Mandamus and Prohibition—Filed June 27, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, Honorable Francis L. Van Dusen, hereby makes answer to the several Petitions for Writs of Mandamus and Prohibition filed in the above-entitled cases, as follows:

[fol. 90] 1. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are matters of record in the civil actions in which respondent entered his orders dated April 6 and April 27, 1962 are admitted.

2. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are in accordance with the findings embodied in the Opinion of respondent dated April 6, 1962, a copy of which is attached to the Petitions in Nos. 13,994 and 13,997, are admitted.

3. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are contrary to the findings embodied in respondent's Opinion dated April 6, 1962 are denied, including, but not limited to such paragraphs as 19 and 23 of the Petition in No. 13,994 and paragraph 15 of the Petition in No. 13,997.

4. Respondent is without knowledge or information sufficient to form a belief as to the truth of those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are not of record and which are neither supported nor controverted by the findings embodied in the respondent's Opinion dated April 6, 1962.

5. No answer is required to those allegations of the Petitions for Writs of Mandamus and Prohibition which are conclusions of law, but in answer thereto, respondent hereby incorporates the conclusions embodied in his Opinions dated April 6 and April 27, 1962.

6. Respondent avers that he carefully considered the interests stipulated in the provisions of Title 28 U.S.C. [fol. 91] §1404(a); carefully considered the legal rights and interests of petitioners; and carefully considered the matters submitted to him by counsel for the parties in their motions, affidavits, briefs, letters, other memoranda and oral arguments prior to the entry of his order transferring these civil actions to the United States District Court for the District of Massachusetts, and that he carefully reconsidered the same matters before entering his order dated April 27, 1962.

7. Respondent avers that his orders, dated April 6 and April 27, 1962, were based on the findings and conclusions contained in Respondent's Opinions dated April 6 and April 27, 1962, all of which are incorporated herein.

8. Respondent avers that the entry of the orders constituted an exercise of discretion within the jurisdiction conferred on the District Court by Congress in Title 28 U.S.C. §1404(a). Respondent believes, and therefore avers, that he faithfully exercised his discretion in entering these orders in accordance with the provisions of Title 28 U.S.C. §1404(a) as interpreted and applied by the decisions of this Court and of the United States Supreme Court.

9. Respondent denies that these orders are in violation of any act of Congress or of the Constitution of the United States; denies that these orders constitute an injustice to any of the petitioners; and denies that they deprive any of the petitioners of any legal right.

10. Respondent respectfully submits that in accordance with the language of 28 U.S.C.A. §1404(a), as worded by Congress, and the prior decisions of this Court, his exercise of discretion in entering these orders on the record before him is not reviewable by this Court.

11. Respondent respectfully submits that the entry of these orders is not reviewable on Petitions for Writs of [fol. 92] Mandamus or Prohibition, and that the extraordinary remedy of the Writ of Mandamus and Prohibition is not available to petitioners on this record.

12. Respondent denies that there was or is any need to restrain the transfer of these cases by the Clerk of the United States District Court for the Eastern District of Pennsylvania and, hence, denies paragraph 25 of the Petition in No. 13,994, paragraph 18 of the Petition in No. 13,997, and paragraph X of the Petition in No. 14,033.

Wherefore respondent prays that the Petitions for Writs of Mandamus and Prohibition be dismissed.

Owen B. Rhoads, Dechert, Price & Rhoads, Attorneys for Respondent, 1600 Three Penn Center Plaza, Philadelphia 2, Pennsylvania.

Robert E. Jones, Rawle & Henderson, Attorneys for Respondent, 1910 Packard Building, Philadelphia 2, Pennsylvania.

Sidney L. Wickenhaver, Montgomery, McCracken, Walker & Rhoads, Attorneys for Respondent, 1421 Chestnut Street, Philadelphia 2, Pennsylvania.

Morton Hollander, Chief, Appellate Section, Attorney for Respondent, United States Department of Justice, Washington 25, D. C.

[fol. 93] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13994, 13997, 14003, 14011, 14033

ROBERTA BARRACK, Admx., etc., et al.,
Petitioners in No. 13994,

SIDNEY W. POPKIN, et al.,
Petitioners in No. 13997,

HOWARD H. RAPP, Admr., etc., et al.,
Petitioners in No. 14003,

LEAH BIERNBAUM, Extrs., etc., et al.,
Petitioners in No. 14011,

DORIS A. LAISTER, Extrx., etc., et al.,
Petitioners in No. 14033,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent,

and

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA, Intervenors.

ON PETITIONS FOR WRITS OF MANDAMUS OR PROHIBITION —Argued October 2, 1962

Before STALEY and FORMAN, Circuit Judges, and LANE, District Judge.

[fol. 94]

OPINION OF THE COURT—Filed November 19, 1962

By STALEY, Circuit Judge.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U.S.C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be [fol. 95] vacated as a matter of law. Lastly, they contend

[1] "§ 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1958 ed.).

[2] The opinion is reported at 204 F. Supp. 426.

[3] The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956).

that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in Swindell-Dressler Corp. v. Dumbauld, — F.2d — (C.A.3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U.S.C.A. § 1292(b).[4] But that very issue was squarely raised in *Swindell-Dressler* and was decided in the negative.[5] We, therefore, conclude that these petitions are properly before us.

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[4] "§ 1292. Interlocutory decisions

• • •

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order • • •." 28 U.S.C. § 1292(b) (1958 ed.).

[5] As we indicated in Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (C.A.3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

On the merits, petitioners contend that because the personal representatives in the death actions have not ob-
[fol. 96] tained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404(a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in relevant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *"

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, Boutillier v. Wesinger, 322 Mass. 495, 78 N.E.2d 195 (1948), and that appointment as an ancillary or special administrator is in the discretion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in Hoffman v. Blaski, 363 U.S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U.S. at pp. 343-344.

Respondent and intervenors would limit the holding in Hoffman v. Blaski, supra, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which
[fol. 97] transfer has been effected although the suits would have been barred by the statute of limitations applicable in

the transferee district.* Additionally, they argue that the phrase "the action" does not include the parties to the action.

We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in Felchlin v. American Smelting and Refining Co., 136 F. Supp. 577 (S.D. Calif. 1955). There, suit was filed by California executors, [fol. 98] and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that because Texas forbids suits by

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* H. L. Green Co. v. McMahon, — F.2d — (C.A.2, 1962); Headrick v. Atchison, T.&S.F.Ry., 182 F.2d 305 (C.A.10, 1950); Gomez v. S.S. Dorothy, 183 F. Supp. 499 (D. Puerto Rico, 1959); Crawford v. S.S. Shirley Lykes, 148 F. Supp. 958 (S.D.N.Y. 1957); Curry v. States Marine Corp. v. Delaware, 118 F. Supp. 234 (S.D. N.Y. 1954); Frechoux v. Lykes Bros. S.S. Co., 118 F. Supp. 234 (S.D.N.Y. 1953); Greve v. Gibralter Enterprises, 85 F. Supp. 410 (D.N.M. 1949). Six of these seven cases antedate Hoffman v. Blaski, supra. Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25(b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these [fol. 99] petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The

short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil [fol. 100] Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

[fol. 101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

ROBERTA BARRACK, Admx., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

SIDNEY W. POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

HOWARD H. RAPP, Admr., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

LEAH BIERNBAUM, Extrs., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

DORIS A. LAISTER, Extrx., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: STALEY and FORMAN, Circuit Judges, and LANE, District Judge.

ORDER DIRECTING ISSUANCE OF WRITS OF MANDAMUS—
December 7, 1962

Upon consideration of the petitions for writs of mandamus or prohibition, of the anwers by respondent and of the briefs, and after hearing:

It is Ordered, Adjudged and Decreed by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By the Court,

Staley, Circuit Judge.

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13994

BARRACK, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14003

RAPP, Administrator, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, Executrix, etc., et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

PEREMPTORY WRIT OF MANDAMUS

United States of America,
Third Judicial Circuit, ss.

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, Greetings:

Whereas the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A"; and

Whereas the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

[fol. 103] Whereas the respondent has filed answers to the petitioners; and

Whereas the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

Whereas after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

Whereas on December 7, 1962 this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition in accordance with the opinion of the Court;

Now Therefore the Respondent, the Honorable Francis L. Van Dusen Is Hereby Required and Commanded, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962 in the civil actions enumerated in Exhibit "B" attached to this writ.

Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962

[fol. 104]

EXHIBIT "A" TO PEREMPTORY WRIT OF MANDAMUS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP., and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C. A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions.

ORDER SUR MOTIONS TO TRANSFER

(Documents Nos. 28, 29 & 30 in C. A. 28664; Nos. 30, 31 & 32 in C. A. 28741; Nos. 23, 24 & 25 in C. A. 28762; Nos. 26, 27 & 28 in C. A. 28763; Nos. 13 & 15 in C. A. 28764; Nos. 13 and 15 in C. A. 28788; Nos. 13 & 15 in C. A. 28789; Nos. 22, 23 & 24 in C. A. 29099; Nos. 12 & 14 in C. A. 29100; Nos. 22, 23 & 24 in C. A. 29159; Nos. 22, 23 & 24 in C. A. 29160; Nos. 11 & 13 in C. A. 29161; Nos. 11 & 13 in C. A.

29162; Nos. 22, 23 & 25 in C. A. 29274; Nos. 12 & 14 in C. A. 29275; Nos. 20, 21 & 22 in C. A. 29615; Nos. 9 & 11 in C. A. 29616; No. 9 in C. A. 29724; Nos. 15, 16 & 17 in C. A. 29768; Nos. 15, 16 & 17 in C. A. 29881; Nos. 15, 16 & 17 in C. A. 29882; Nos. 15, 16 & 17 in C. A. 29883; Nos. 15, 16 & 17 in C. A. 29884; Nos. 8 & 11 in C. A. 29901; Nos. 21, 22 & 23 in C. A. 30078; Nos. 20, 21 & 22 in C. A. 30079; Nos. 11, 12 & 13 in C. A. 30200; No. 7 in C. A. 30230; No. 2 in C. A. 30258; Nos. 12, 13 & 14 in C. A. 30260; No. 2 in C. A. 30263; Nos. 9, 10 & 13 in C. A. 30266; Nos. 15, 16, 17 & 24 in C. A. 30284; No. 6 in C. A. 30288; No. 6 in C. A. 30289; Nos. 13, 14 & 15 in C. A. 30300; Nos. 13, 14 & 15 in C. A. 30301; No. 11 in C. A. 30302; No. 4 in C. A. 30303; No. 2 in C. A. 30304; No. 11 in C. A. 30305; No. 2 in C. A. 30306; No. 12 in C. A. 30843; Nos. 13, 14 & 15 in C. A. 30344; Nos. 15, 16 & 17 in C. A. 30346)

AND NOW, April 6, 1962, IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. S 1404(a).

/s/ FRANCIS L. VAN DUSEN

CA. 30303 (See Opinion filed earlier today.
CA 30304 The record indicates that this case should also be transferred due to improper venue in this District.
In this action, the Motion to Dismiss (Document No. 4) is being treated as an alternative Motion to Transfer in order to avoid precluding the plaintiff from recovering, and the District of Massachusetts is considered a more appropriate forum to which to transfer the case than the Middle District of Pennsylvania for the reasons stated in the above Opinion.

[fol. 105]

EXHIBIT "B" TO PEREMPTORY WRIT OF MANDAMUS

C. A. No. 28762

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28763

Henry C. Gransden, Adms. of the Estate of
Henry V. Gransden, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28788

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 28789

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29099

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29100

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

[fol. 106]

C. A. No. 29159

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29160

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29161

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29162

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29274

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29275

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

[fol. 107]

C. A. No. 29615

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29616

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d. pty. deft.

C. A. No. 29724

Doris A. Laister, as Execx. of the Estate of Chester H. Laister, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 29768

Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29881

Edna E. Long and Laura Mauney, Admrxs. of the Estate of Shirley E. Reitz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29882

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

Eastern Air Lines, Inc., et al.

[fol. 108]

C. A. No. 29883

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29884

Diane Braff, Admrx. ad prosequendum and as General Admrx. of the Estate of Bernard Jay Braff, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30078

Howard H. Rapp, Admr. of the Estate of Richard F. Zeller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30200

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30230

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc.

C. A. No. 30258

Ronald London, Admr. C. T. A. of the Estate of
Phillip London, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

[fol. 109]

C. A. No. 30260

Ronald London, Admr. of the Estate of
Philip London, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30263

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30266

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30284

Nancy A. Frankenfield, Admrx. of the Estate of
George B. Frankenfield, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30288

Selma Birenbaum, Abe Birenbaum and Abram P. Piowsky
as Executors of the Estate of Martin Birenbaum, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30289

Sylvia Barrack as the widow of Morris Barrack, deceased and the First Pennsylvania Bank and Trust Company, as Executors of the Estate of Morris Barrack, deceased

v.

Eastern Air Lines, Inc.

[fol. 110]

C. A. No. 30301

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, Co-Executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30302

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30305

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30306

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, co-executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30343

Joseph Thompson, Jr., Admr. of the Estate of Letha Mae Thompson, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., Third Pty. Defts.

[fol. 111]

C. A. No. 30344

Joseph Thompson, Jr., admr. of the Estate of Letha Mae Thompson, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30346

Donald A. Scott, Admr. of the Estate of Thomas L. Moody, Deceased

v.

Eastern Air Lines, Inc., et al.

[fol. 112] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

RAPP, Administrator, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,011

BIERNBAUM, et al., Executors, etc., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,033.

LAISTER, Executrix, etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

ORDER STAYING EXECUTION OF PEREMPTORY WRIT OF MANDAMUS—December 26, 1962

Present: Staley and Forman, Circuit Judges, and Lane, District Judge.

Upon consideration of the petition for stay of the execution of the peremptory writ of mandamus in these cases filed by Intervenors, Eastern Airlines, Inc., Lockheed Aircraft Corporation and General Motors Corporation,

It is Ordered That,

1. The execution of the peremptory writ of mandamus shall be stayed for a period of thirty days from December 14, 1962;

2. If within the said period of 30 days, there shall be filed with the Clerk of this court a certificate from the Clerk of the Supreme Court in accordance with Rule 36 (2) of this Court's Rules, the stay shall continue until final disposition of these cases by the Supreme Court; and

3. The Honorable Francis L. Van Dusen is directed to stay further proceedings in these cases until further order of this Court.

By the Court,

Staley

Dated: December 26, 1962.

[fol. 113]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

RAPP, Administrator, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,011

BIERNBAUM, et al., Executors, etc., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

[fol. 114]

No. 14,033

LAISTER, Executrix, etc., et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

ORDER AMENDING OPINION

Present: Staley and Forman, Circuit Judges, and Lane, District Judge.

It is Ordered that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

> "What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the

Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an admin- [fol. 115] istrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By the Court,

Staley, Circuit Judge.

Dated: February 21, 1963.

[fol. 116]

SUPREME COURT OF THE UNITED STATES

No. 738—October Term, 1962

HONORABLE FRANCIS L. VAN DUSEN, Judge, etc., et al.,
Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., et al.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 851 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 117]

SUPREME COURT OF THE UNITED STATES

No. 851—October Term, 1962

FRANCIS L. VAN DUSEN, United States District Judge, Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., et al.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 738 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.